determine the nature of the instrument that is executed and the defenses that may be available to him.[10] If the controlling law allows the maker to set up a personal defense even against a holder in due course, such law should be followed in every other jurisdiction, although the municipal law of the forum and of the place where the plaintiff acquired the instrument may be to the contrary.[11] The question of what constitutes a holder for value concerns the extent of the defendant's obligation. Has the defendant agreed that he will not avail himself of any personal defense as against a party who may acquire the instrument as collateral security for an antecedent debt? In accordance with the above point of view the law governing his contract in general should furnish the answer to this question, and this is the rule which is supported by the weight of authority in this country. It appears to be also the view followed by the principal case.

The case of *Embiricos v. The Anglo-Austrian Bank*[12] is not inconsistent with the above conclusion. That case in its broadest interpretation holds only that a title acquired in a mode recognized by the law of the place of transfer is binding upon the maker, though such transfer does not conform to the municipal law of bills and notes of the state governing the maker's contract. It is a qualification of the ordinary principles of the Conflict of Laws applicable to bills and notes which is based upon the analogy of the law governing chattels.

E. G. L.

INDIVIDUAL LIABILITY OF THE OFFICERS OF A NON-COMPLYING FOREIGN CORPORATION

It is not good to be a non-complying foreign corporation; to be a part of one is worse. There are statutory fines for the corporation doing business without obtaining authority in the prescribed fashion. Many courts hold contracts with such a corporation enforceable against it, but not in its favor.[1] Officers and directors are sometimes made sureties for corporate debts.[2] And a few states, with which Illinois

[10] *Brabston v. Gibson, supra.*

[11] *Ory v. Winter* (1826, La.) 4 Mart. N. S. 277.

[12] (C. A.) [1905] 1 K. B. 677, 74 L. J. K. B. 326.

[1] *United Lead Co. v. Reedy Elevator Mfg. Co.* (1906) 222 Ill. 199, 78 N. E. 567; *Parke, Davis and Co. v. Mullett* (1912) 245 Mo. 168, 149 S. W. 461, approved in the principal case as exemplifying "one of the ordinary principles of law"; 25 L. R. A. 569, and cases cited. But see as to estoppel of one who deals with such a corporation, *Second Natl. Bk. v. Hall* (1878) 35 Oh. St. 158, 166; and note 14*a infra.*

[2] *Slater v. Taylor* (1909) 241 Ill. 102, 89 N. E. 271. And the agent as well as the corporation may be subject to a statutory fine. Wis. Stat. 1911, chap. 85, sec. 1770*b* II.

has now aligned itself by the decision in *Joseph T. Ryerson & Son v. Shaw* (1917) 277 Ill. 524, 115 N. E. 650,[3] add officers' and directors' direct individual liability for claims arising out of business done in the state in the corporate name. Nor is this all. There is more than an intimation of the final step in the development: that the court is ready under such circumstances to hold stockholders, too, as partners.[4]

Individual liability has been imposed upon stockholders of a foreign corporation by statute in Colorado, California, and elsewhere;[5] when so imposed, it has been recognized by the Federal Supreme Court, though the state of incorporation expressly provided against individual liability, and though the stockholder was sued in a third state.[6] But Illinois has no such statute; the court reasoned on common law principles.

Now partnership liability in the stockholders has not been without recognition at common law. Sometimes it is imposed because the court, finding fraud in the act of incorporation, refuses to recognize the latter as valid at all;[7] sometimes because corporate action before compliance is held beyond the corporators' power, so that they are treated as partners, like any body of individuals doing business without authority to act as a corporation;[8] or the stockholders' liability, though impliedly admitted, may be limited to business of a sort prohibited from

---

[3] S. c. below (1916) 201 Ill. App. 445. A collection of authorities on this point can be found in L. R. A. 1917 B, 574.

[4] The holding is made to follow from *Hill v. Beach* (1858) 12 N. J. Eq. 31; *Taylor v. Branham* (1895) 35 Fla. 297, 17 So. 552, is expressly approved.

[5] Mill's Ann. Stat. Col. 1912, §501; *N. D. Rev. Codes 1905* §4698, applied in *Chesley v. Soo Lignite Co.* (1909) 19 N. D. 18, 121 N. W. 73; *Cal. Const.* art. xii, §3; *Civ. Code* §322, applied in a series of cases ending with *Provident Gold Mining Co. v. Haynes* (1916) 173 Cal. 44, 159 Pac. 155. It is to be noted that the liability imposed by California is for a share of the corporate debt proportional to the share of the stock held by the defendant. For a discussion of this line of cases, see COMMENTS (1916) 26 YALE LAW JOURNAL, 143.

[6] *Thomas v. Matthiessen* (1914) 232 U. S. 221, 34 Sup. Ct. R. 312: the corporation had been organized in Arizona to do business in California and elsewhere; a charter provision exempting stockholders from individual liability was held nullified *pro tanto* by another charter provision authorizing business to be done outside Arizona, hence necessarily in accordance with the laws of the place of any outside transaction; the stockholder was successfully sued in the Federal courts in New York. *Cf. Leyner Engineering Works v. Kempner* (1908, C. C. S. D. Tex.) 163 Fed. 605, which refused to apply the Colorado statute to a Texas corporation, because the stockholders had nowhere assented to be individually liable.

[7] *Montgomery v. Forbes* (1889) 148 Mass. 249, 19 N. E. 342; *Davidson v. Hobson* (1894) 59 Mo. App. 130; *Journal Co. v. Nelson* (1908) 133 Mo. App. 482; 113 S. W. 690.

[8] *Cunnyngham v. Shelby* (1916) 136 Tenn. 176, 188 S. W. 1147, developing from *Morton v. Hart Bros.* (1890) 88 Tenn. 427, 12 S. W. 1026, where the foreign corporation's agent was held.

transaction without a permit;[9] or to business which cannot in the state concerned be done by any corporation.[10] In many of the cases which hold the stockholders the motive underlying the decision appears to be the desire to frustrate a palpable attempt by the defendants to slip by the law. And in the lack of some such special circumstance the cases lean—and properly—toward denying direct recovery against stockholders, treating the non-complying foreign corporation in this respect as if it were *de facto*.[11] The true principle would seem to be that the law and the creations of the law of any state should be held good unreservedly in every other state, where they do no violence to rule or policy of the forum, or of the state of the transaction[12]—which are in these cases almost always the same.

Such is not the reasoning of the principal case:[13] there the basic proposition is extraterritorial non-existence of a corporation. It is not clear how, on such a base of theory, the court can also build the non-complying corporation's liability to be sued on within-state transactions. Against a being which "exists only in contemplation of law," and that only inside the state of its creation, suits are to be brought—and are in fact brought—in a court where the being "does not exist at all!"

This liability of the corporation to be sued as a corporation, however, fits joint for joint with the true common law principle outlined above. Disability, where imposed, to sue on a contract made without

---

[9] *Lescher & Sons Co. v. Moser* (1913 Tex. Civ. App.) 159 S. W. 1018, 1026.

[10] *Empire Mills v. Alston Grocery Co.* (1891, Tex. Civ. App.) 4 Willson 346, 15 S. W. 505; and see *Mandeville v. Courtright* (1905, C. C. A. 3d) 142 Fed. 97.

It is to be noted in the above cases that the distinction between agents' liability and that of stockholders was not always before the court's mind, as the defendants were often related to the corporation in both capacities. The language of the decisions therefore demands careful reading before conclusions are drawn. It is dubious, e. g., whether *Mandeville v. Courtright* can fairly be cited at all on the liability of stockholders as such.

[11] *Merrick v. Van Santvoord* (1866) 34 N. Y. 208; *Second Natl. Bk. v. Hall* (1878) 35 O. St. 158; *Boyington v. Van Etten* (1896) 62 Ark. 63, 35 S. W. 622; and see *Natl. Bk. v. Spot Cash Coal Co.* (1911) 98 Ark. 597, 605, 136 S. W. 953, 956; and *Tribble v. Halbert* (1910) 143 Mo. App. 524, 127 S. W. 618.

[12] See *Bateman v. Service* (1881) L. R. 6 App. Cas. 386, 389, cited COMMENTS (1917) 26 YALE LAW JOURNAL, 481, 484, where the problem is discussed from the standpoint of conflict of laws; *Merrick v. Van Santvoord* (1866) 34 N. Y. 208, 215.

[13] Nor, indeed, of most cases, unfortunately. For an excellent theoretical treatment of the disconcerting fact that corporations do not break out over the map in blotches, like measles, see *Merrick v. Van Santvoord, supra.* After all, a corporation is at bottom only an association of persons having a particular mode of doing business, decked about with fictions; on this see articles on the individual liability of stockholders by Professor Wesley N. Hohfeld, 9 COL. L. REV. 285; 9 *ibid.* 492; 10 *ibid.* 283; 10 *ibid.* 520.

complying, should be deemed a penalty—like statutory fines[14]—laid by the policy of the state on attempting corporate business without authority.[14a] Or, where policy forbids business without compliance, the agent who knowingly breaks over the law may properly be held by those who relied on his misrepresentation:[15] that the corporation would be available, should suit be necessary. That seems the crux of the agent's fault; only in that can damage consist from misrepresentation of "authority," whether indemnity be sought in an action for deceit or in one for breach of warranty. But it is clear that no such theory of agency would suffice to hold the officers and directors where the corporation itself is in fact subject to suit;[16] and the principal case states that it is so subject.

The court avoids the difficulty by treating officers and directors as partners, as some states treat the stockholders: a body doing business without authority to be a corporation. Between agents actively managing the concern, to whose direct fault non-compliance can be traced, and stockholders relying on such agents there is a difference, one none can help but feel. A distinction in individual liability based on that difference is sound.[17] Whether any court take the final step is a matter of pure policy. But it is to be regretted that in going this far Illinois thought it good to base its decision on cases embodying the dubious theory of an agent's "common law liability as principal" where he contracts without authority,[18] and on that ghost of a ghost, a corporation's extraterritorial non-existence.

K. N. L.

---

[14] *Oliver Co. v. Louisville Realty Co.* (1913) 156 Ky. 628, 161 S. W. 570.

[14a] *Citizens' Natl. Bk. v. Bucheit* (1916 Ala.) 71 So. 82. The *de facto* corporation analogy is sometimes applied to estop a defendant who has dealt with the corporation to deny its authority; *Second Natl. Bk. v. Hall, supra.* There is, however, a valid distinction in that the non-complying foreign company having taken no *bona fide* step to bring itself within the law, lacks the buttressing of public policy. Power to incur only duties or liabilities without corresponding advantages is rare in our law, but is here and there to be found. That is the nature of a non-complying corporation's power, under the disabling mentioned in the text. Somewhat akin is the power of a discharged bankrupt to come under a duty, by a mere promise, to pay any debt from which his bankruptcy discharged him; or, indeed, the power of a person, by a gratuitous sealed instrument, to impose a legal duty upon himself.

[15] *Cf.* Mechem, *Agency*, 2d ed. § 1395.

[16] See (1917) 12 ILL. L. REV. 207. Of course this argument fails as to agents of insurance companies, where the qualification rules are directed to the company's solvency; which, consequently, the agent is held to guarantee. *Morton v. Hart Bros., supra;* and see *Vertrees v. Head* (1910) 138 Ky. 83, 91, 127 S. W. 523, 526. But *cf. Jones v. Horn* (1904) 104 Mo. App. 705, 78 S. W. 638.

[17] See *Mandeville v. Courtright, supra,* 100; *Second Natl. Bk. v. Hall, supra,* 166.

[18] *Lasher v. Stimson* (1892) 145 Pa. St. 30, 23 Atl. 552, quoted and affirmed *Raff v. Isman* (1912) 235 Pa. St. 347, 84 Atl. 352.